LIM JIT KIM & ORS

v.

GOH SIEW KOON & ORS

HIGH COURT MALAYA, MALACCA
LOW HOP BING J
[COMPANIES (WINDING-UP) NO: MT1-28-23-2004]
7 DECEMBER 2004

COMPANY LAW: *Winding up - Petition - Application to strike out - Multiplicity of proceedings - Two petitions presented by same petitioners upon similar grounds - Whether a duplicity of proceedings - Whether second petition must necessarily be struck out - Considerations - Whether more appropriate to stay second petition - Courts of Judicature Act 1956, s. 25(2) & para 11 of Schedule - Companies Act 1965, ss. 222, 218(1)(f), (i)*

This was a notice of motion by the respondents to strike out the instant winding-up petition [presented by the petitioners against the 7th respondent company ('the company') pursuant to s. 218(1)(f) and (i) of the Companies Act 1965 ('the 65 Act')] under the inherent jurisdiction of the court on the grounds that: (i) there would be a multiplicity of proceedings; (ii) there has been a serious non-disclosure respecting an earlier winding-up petition ('the 1st petition'); (iii) the instant petition was filed in bad faith and with the ulterior motive of obtaining oppressive interlocutory-relief *ex parte*; and (iv) that the instant petition was an abuse of the process of the court.

It was in evidence that the petitioners had presented the 1st petition against the company under the same provisions of the 65 Act and upon simliar grounds. However, before the 1st petition could be advertised or served on the company, the respondents had instituted committal proceedings (pursuant to a defamation suit) against the petitioners for presenting it. Subsequently, however, the High Court had dismissed the committal proceedings and the respondents immediately filed an appeal to the Court of Appeal, pending which the petitioners did not take any further action on the 1st petition.

Held:

[1] Whether or not a multiplicity of proceedings (petitions) in respect of the winding-up of a company would lead to the striking out of the subsequent petition or petitions will have to depend on the facts and circumstances of each particular case. In the present case, the instant winding-up petition

(*vis-à-vis* the 1st petition) was presented by the same petitioners against the same respondents upon substantially similar grounds. There was, therefore, a duplicity of proceedings. (p 286 e-f)

[2] Nevertheless, it was inappropriate to strike out the instant petition. Indeed, it would be more suitable that the instant petition be stayed (under s. 25(2) of the Courts of Judicature Act 1956 read together with para 11 of the Schedule thereto or s. 222 of the 65 Act) pending the hearing and determination of the 1st petition. (p 287 a-d)

[Instant petition stayed pending disposal of 1st petition; each party to bear its own costs.]

Case(s) referred to:

In Re European Banking Company; ex p Baylis [1866] LQ 2 Eq 521 ***(refd)***
In Re Joint Stock Coal Company [1869] 8 LR Eq 146 ***(refd)***
In Re Norton Iron Co [1877] 47 LJ Ch 9 ***(refd)***
Ladli Parshad Jaiswal v. Karnal Distillery Co Ltd [1954] 24 Comp Cas 77 ***(refd)***
Lim Oh & Ors v. Allen & Gledhill [2001] 3 CLJ 233 FC ***(refd)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
Re Building Societies Trust Ltd [1890] 44 Ch 140 ***(refd)***
Re Filby Bros (Provender) Ltd [1958] 1 WLR 683 ***(refd)***
Syed Ahmad Abdul Salam & Ors v. Naina Mohamed & Sons (Penang) Sdn Bhd [1998] 3 CLJ Supp 81 HC ***(refd)***
Tan Kim Hor & Ors v. Tan Heng Chew & 8 Ors (Kuala Lumpur High Court Companies Winding Up Petition No D3-28-467-2002) (Unreported) ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218(1)(f), (i), 222

Other source(s) referred to:

Alex Chang Huey Wah, *Companies Winding-Up Handbook MLJ Handbook Series 2003*, p I 49 & p II 193
KV Padmanabha Rau, *Winding Up of Companies*, pp 174-178

For the petitioners - SP Chandra; M/s SF Pang & Chandra
For the respondents - Lim Kean Leong; M/s Lim Kian Leong & Co

Reported by Gan Peng Chiang

JUDGMENT

Low Hop Bing J:

Notice Of Motion

This notice of motion in encl. (17) filed by respondents 1, 2, 3, 4, 6 and 7 ("the respondents") prays for an order that the winding-up petition herein ("the petition herein") be struck out under the inherent jurisdiction of the court on the grounds that:

1. there is multiplicity of proceedings;
2. there is serious non-disclosure of the first winding-up petition;
3. the petition herein has been filed in bad faith with ulterior motive to obtain oppressive *ex parte* interlocutory relief; and
4. the petition herein is an abuse of the process.

Factual Background

On 7 May 2004, the petitioners presented the petition herein against Sing Lian Sdn Bhd. (respondent 7) under s. 218(1)(f) and (i) of the Companies Act 1965. The other six respondents were also included.

Prior to the presentation of the petition herein, the petitioners had on 19 October 2001 presented another winding-up petition against respondent 7 under the same provisions of the Act ("the first petition"). The other six respondents were also included.

Before the first petition could be served on the respondents, the respondents in a defamation suit in the High Court of Malaya at Kuala Lumpur *vide* Civil Suit No. S3-23-95-2001 ("the KL defamation suit") instituted committal proceedings against the petitioners for presenting the first petition. The petitioners did not serve the first petition on the respondents nor advertise the same in the newspapers and the Government Gazette as required by the Companies (Winding-up) Rules 1972.

On 22 May 2003, the respondents' committal proceedings were dismissed by the Kuala Lumpur High Court. Before the petitioners could take any further step in the proceedings with regard to the first petition, the respondents filed an appeal to the Court of Appeal against the decision of the Kuala Lumpur High Court dismissing their committal proceedings.

Pending the hearing and determination of the said appeal in the Court of Appeal, the petitioners did not proceed any further with the first petition.

The first petition had not been withdrawn prior to the filing of the petition herein. The filing of the petition herein is in effect supported by substantially the same grounds as those for the first petition.

The petitioners have on 16 June 2004 filed the request to withdraw the first petition, but the respondents have not consented thereto, in view of disputed costs.

Multiplicity Of Proceedings

Learned counsel Mr. Lim Kean Leong, assisted by Ms Tan Shin Shin, submitted for the respondents that the factual background as alluded to above constitutes, *inter alia*, multiplicity of proceedings, so that the petition herein should be struck out, citing *"Winding Up of Companies"* by K.V. Padmanabha Rau pp. 174 to 178; *Syed Ahmad Abdul Salam & Ors v. Naina Mohamed & Sons (Penang) Sdn. Bhd* [1998] 3 CLJ Supp 81; *Tan Kim Hor & 9 Ors v. Tan Heng Chew & 8 Ors* (Kuala Lumpur High Court Companies Winding Up Petition No. D3-28-467-2002) HC; and *Lim Oh & Ors v. Allen & Gledhill* [2001] 3 CLJ 233.

They said that the Court of Appeal decision in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248 has no application here as the facts there were different.

The response of Mr. S.P. Chandra, learned counsel for the petitioners, is that the two High Court decisions *viz Syed Ahmad, supra*, and *Tan Kim Hor, supra*, are no longer applicable in view of the Court of Appeal decision in *Maril-Rionebel, supra*. He contended that it is not an abuse of process to file two somewhat similar winding-up petitions but with some variations against the same respondents and that the respondents' application to strike out the second petition is itself an abuse of process, on the basis of the judgment of Abdul Hamid Mohamad JCA in *Maril-Rionebel, supra*, at p. 267.

He added that in view of the committal proceedings in the KL defamation suit against the petitioners for presenting the first petition, the petitioners were not able to serve the first petition on the respondents and to advertise the same in the newspapers and Government Gazette.

He stressed that the first petitioner has averred in his affidavit that the instant petition is substantially different from the first petition in that it contains further matters that have occurred or been discovered since the presentation of the first petition that could not have been included in the first petition by way of amendments.

I shall first consider the extent of support which the petitioners may derive from *Maril-Rionebel, supra.* In relation to the "two petitions argument", Gopal Sri Ram JCA held at p. 257 that it is not an abuse of process where there was, at the date on which the respondent presented its petition, already in existence another petition presented much earlier by another creditor. The learned judge of the Court of Appeal referred to the judgment of Dulat J in *Ladli Parshad Jaiswal v. Karnal Distillery Co. Ltd* [1954] 24 Comp Cas 77, in which two co-existing petitions were presented. So also:

1. In *In Re Joint Stock Coal Company* [1869] 8 LR Eq. 146, where there were two petitions by the shareholders for the winding-up of the same company;

2. In *In Re Norton Iron Co* [1877] 47 LJ Ch. 9;

3. *In Re Building Societies Trust Limited* [1890] 44 Ch. 140 where two petitions were presented by separate creditors;

4. In *In Re European Banking Company; Ex parte Baylis* [1866] LQ 2 Eq. 521 where several petitions were presented for the winding-up of the same company by the creditors;

5. In *Re Filby Bros. (Provender), Ltd* [1958] 1 WLR 683, where a petition had been presented by one judgment creditor in the county court while subsequently another petition was presented in the High Court, and Roxburgh J ordered the proceedings in the county court to be transferred to the High Court.

From my analysis of the above authorities cited for the petitioners, a common denominator emerges and that is they demonstrate a multiplicity of proceedings.

Regarding the authorities relied upon by the respondents, it is to be noted that in *Syed Ahmad, supra,* there was an application by way of notice of motion for an order to strike out a winding-up petition. The material events showed that a winding-up petition was filed to wind up the respondent company but this was struck out on the ground that the petition failed to comply with the Companies (Winding-up) Rules 1972. Subsequently, another petition to wind

up the respondent company was filed by the said petitioner and two other petitioners, based on the same grounds as the earlier winding up petition. After having filed the second petition, the petitioners appealed against the order striking out the first petition and this matter was still pending in the Court of Appeal. Abdul Hamid Mohamad J (now FCJ) in allowing the striking out, held, *inter alia*, that the petitioners should not have appealed against the striking out of the first petition subsequent to filing a second petition to wind up the respondent company based on the same grounds as the first petition, and that there was clearly a duplicity of proceedings and an abuse of process of the court.

Next, in *Tan Kim Hor, supra*, the facts revealed that there were two petitions filed by the petitioners before the court; the first had been struck out by the trial judge but was subsequently reinstated by the Court of Appeal, while the second petition was before Zulkefli J who found that the second petition was manifestly unsustainable and an abuse of the court process on the ground of duplicity of proceedings.

A classic example of an abuse of process is to be found in *Lim Oh & Ors v. Allen & Gledhill, supra,* where the Federal Court through the judgment of Steve Shim CJ (Sabah and Sarawak) held, *inter alia*, that the filing of the second suit containing the same issues and reliefs as the first suit amounted to an abuse of process.

From all the authorities cited for both the petitioners and the respondents, it is clear to me that whether the multiplicity of proceedings would result in striking out the second proceeding or petition would essentially depend on the facts and circumstances prevailing in each particular case.

Having regard to the factual background herein, it is abundantly obvious to me that the petition herein was presented by the same petitioners against the same respondents based on substantially the same grounds and that both the petitions accentuate a multiplicity of proceedings.

Striking Out Or Stay

In the light of the undisputed facts which clearly constitute multiplicity or duplicity of proceedings, the next question for me to determine is whether I should order the petition herein to be struck out or stayed.

It has been said by Abdul Hamid Mohamad JCA (now FCJ) in *Maril-Rionebel* at p. 267b that an application to strike out a petition is "one of the most abused procedures adopted in winding up proceedings".

On the facts and circumstances as narrated above, I am of the view that it is eminently unsuitable to strike out the petition herein.

However, under s. 25(2) and para 11 of the Schedule to the Courts of Judicature Act 1964, the court has the power to stay proceedings where by reason of multiplicity of proceedings in any court or courts, the proceedings ought not to be continued. Further power to stay proceedings against a company is to be found in the relevant portion of s. 222 of the Companies Act 1965 in the following words:

> At any time after the presentation of a winding-up petition and before a winding-up order has been made, the company ... may, where any action or proceeding is pending, apply to the court to stay ... further proceedings in the action or proceeding, and the court may stay ... the proceedings accordingly on such terms as it thinks fit. (see also *Companies Winding-Up Handbook* MLJ Handbook Series 2003 p. I 49 and p. II 193 by Alex Chang Huey Wah)

Having regard to the facts and circumstances of the case before me, I am of the view that a fair and reasonable order is to stay all the proceedings in the petition herein which I hereby order pending the hearing and determination of the first petition.

Ulterior Motive And Abuse Of Process

The above grounds would have disposed of this application. However, in view of the submissions prepared and presented by the respective learned counsel, I shall consider them on their merits. It was submitted for the respondents that the petition herein followed by an *ex parte* application for the appointment of a provisional liquidator in respect of matters which relate back many years was presented with the ulterior motive of using it as a platform to obtain oppressive orders and to circumvent the pending committal proceedings, as a result of which it was an abuse of process.

For the petitioners, it was contended that the issue of obtaining an oppressive *ex parte* order for the appointment of provisional liquidator does not arise as this court has directed that that application be heard *inter partes*, and that the appointment of a provisional liquidator is to preserve the assets of the respondent company and to preserve the *status quo* pending the determination of the petition.

In my judgment, it is necessary to observe that while it is true that the petitioners have on 11 May 2004 filed an *ex parte* application seeking an order for the appointment of a provisional liquidator, I have directed that the application be fixed for hearing *inter partes*. That being the case, the question of an ulterior motive on the part of the petitioners is now rendered academic. In the circumstances, the submission presented for all the parties herein and the numerous authorities relied upon by them under this head have been superseded by my direction, in which event, I do not feel the need to embark upon an academic discussion, except to record my appreciation and commendation for their enormous efforts expended thereon.

Costs

As to the costs of this application, in the light of my finding based on the submissions and the factual background, I am of the view that the fair and just order is that the parties herein shall bear their own costs which I hereby order.